IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 20.11.2006

CORAM:

THE HONOURABLE MR. JUSTICE V. DHANAPALAN

C.M.A. No.149 of 1998

Sivashanmugharaja ...Appellant

vs.

S. Narmathai ...Respondent

Civil Miscellaneous Appeal filed under Section 47 of the Guardian and Wards Act, 1890, against the judgment and decree dated 04.11.1997 passed by the Principal District Judge, Cuddalore in O.P. No.75 of 1997.

For appellant :Mr. R. Subramanian
for Ms. Hema Sampath

For respondent :Mr. K. Ramachandran

J U D G M E N T

This Civil Miscellaneous Appeal which is directed against the judgment and decree dated 04.11.1997 passed in O.P. No.75 of 1997 by the Principal District Judge, Cuddalore, (in short "the Tribunal") is preferred under Section 149 of the Guardians & Wards Act, 1890.

2. The respondent herein who was the petitioner before the Tribunal filed an Original Petition under Sections 7 and 10 of the Guardians & Wards Act read with Hindu Minority & Guardianship Act to appoint her as the guardian of her son Jayabalaji (who was a minor at that time) and for his custody as well.

3. Her case before the Tribunal was that she married the appellant on 29.01.1990 and out of their wedlock, a male child was born to them on 10.09.1993; the appellant was guilty of adultery with one Revathy and he brought her to their matrimonial house and forced her to live along with the said Revathy; in course of time, the appellant started inflicting cruelty upon the respondent and hence, she left the matrimonial house in May 1997 and started living with her mother and the child was in

the custody of the respondent. According to her, the child was aged four years and it needed utmost care and affection; the respondent was not employed anywhere but was only running a finance business and was always busy in his business and hence, the child had to be in her custody. Before the Tribunal, she was the sole witness and she marked one exhibit as documentary evidence.

4. In response, the father of the child filed his counter contending that only the father is the natural guardian of the child. He denied the allegation that he was guilty of adultery with one Revathy and on the contrary, it was his case that the petitioner was having affair with one Jayaraman. It was his further case that the petitioner had left the matrimonial house when the child was one year old and the child had been in his custody and he had also admitted the child in a school and hence, the petition had to be dismissed. On his side, he was the sole witness and he marked seven documents to support his case.

5. The Tribunal, on consideration of the oral and documentary evidence and the settled proposition of law, allowed the petition holding that the mother of the child should be entitled to the custody of the minor child on the ground that the latter was only five years old.

6. Mr. R. Subramainan, learned counsel for the appellant-father would contend that the Tribunal has failed to consider the welfare of the child while deciding about its guardianship and no case was made out for removing the child from the care of its father.
7. Mr. K. Ramachandran, learned counsel for the respondent-mother, per contra, would submit that the Tribunal is very much correct in arriving at its conclusion by duly considering the age of the child as four years at that point of time and that being the case, the judgement of the Tribunal is, in no way infirmed.

8. As rightly opined by the Tribunal, there is no point in harping on the subject of adultery of both the parties since the same has not been substantiated by any evidence whatsoever. Thus, the only point for consideration is as to who is entitled to the custodianship of the child.

9. It is settled law that the mother is entitled to the custody of a son till he completes the age of 7 years and of a daughter till she attains puberty. As already stated earlier, since the child was aged less than even five years and taking into account, the welfare of the child, the Tribunal held that the child should be in the custodianship of its mother. I am in agreement with the view expressed by the Tribunal. Yet, in consideration of the developments which had taken place subsequent to the judgment of the Tribunal, I feel it would be only proper to review the guardianship of the child and let me proceed to deal with the same.

10. In this connection, one should not forget the settled proposition of law that neither father nor mother has absolute right to the custody of minor. What is of paramount consideration is that of the child's welfare. While coming to the conclusion as to who would be the better choice to take care of the minor boy as on date, some useful reference could be made a recent decision of the Supreme Court reported in 2006 (1) TLNJ (Civil) 549 (SC) in the case of Sheila B. Das vs. P.R. Sugasree in which, while dealing with the matter of custodianship of a minor girl, the Supreme Court, taking into consideration her welfare, held that her interest would be best served if she remained with her father and the relevant paragraphs read as under:(paras 29 and 30)
"Having regard to the complexities of the situation in which we have been called upon to balance the emotional confrontation of the parents of the minor child and the welfare of the minor, we have given anxious thought to what would be in the best interest of the minor. We have ourselves spoken to the minor girl, without either of the parents being present, in order to ascertain her preference in the matter. The child who is a little more than 12 years of age is highly intelligent, having consistently done extremely well in her studies, and we were convinced that despite the tussle

between her parents, she would be in a position to make an intelligent choice with regard to her custody. From our discussion with the minor, we have been able to gather that though she has no animosity as such towards her mother, she would prefer to be with the father with whom she felt more comfortable. The minor child also informed us that she had established a very good relationship with her paternal aunt who was now staying in her father's house and she was able to relate to her aunt in matters which would concern a growing girl during her period of adolescence.

We have also considered the various decisions cited by the appellant which were all rendered in the special facts of each case. In the said cases, the father on account of specific considerations was not considered to be suitable to act as the guardian of the minor. The said decisions were rendered by the Courts keeping in view the fact that the paramount consideration in such cases was the interest and well-being of the minor. In this case, we see no reason to consider the respondent ineligible to look after the minor. In fact, after having obtained custody of the minor child, the respondent does not appear to have neglected the minor or to look after all her needs. The child appears to be happy in the respondent's company and has also been doing consistently well in school. The respondent appears to be financially stable and is not also disqualified in any way from being the guardian of the minor child. No allegation, other than his purported apathy towards the minor, has been levelled against the respondent by the appellant. Such an allegation is not borne out from the materials before us and is not sufficient to make the respondent ineligible to act as the guardian of the minor."

11. As on date, the minor son is aged 13 years. It is not claimed by the respondent-mother that she is employed; but, it is her case that her mother is employed in Bank of Madura; but she has not proved the same by letting in any evidence, either oral or documentary, except her own deposition. Even in her petition, she has admitted that the appellant is doing finance business and he would most of the time be engaged in his business activities. This goes to show that he would definitely earn a sizeable sum of money which would be sufficient to make both ends meet and also to bring up his minor son. Admittedly, the respondent-mother had left her matrimonial house even when the minor son was very tender in age and it was only the appellant-father who took care of the child till the minor-child was directed to be handed over to the respondent-mother by the Tribunal. Furthermore, it is seen that it is only the appellant-father who has admitted the child in school and given him education. Had he not been a care-taking and affectionate person towards his child, he would not have taken care to admit the child in school. Exs.B.1 and B.2 which are the bills for payment of school fees and purchase of books would reveal that the appellant-father had admitted the child in school. In that view of the matter and taking into account the principles envisaged in the judgment of the Supreme Court (supra) and in consistency with Section 7 of the Guardians and Wards Act, 1890, which empowers the Court to make an order as to guardianship, taking into account the welfare of minor child, I am of the view that the appellant-father would be preferable to the respondent-mother with regard to the guardianship of the child. Accordingly, the respondent-mother is directed to restore the custody of the minor son to the appellant-father.

12. However, to meet the ends of justice and keeping in mind the love and affection of the respondent-mother towards her son, she is at liberty to meet her son periodically, say once in a month, at a particular time and place convenient to herself and the appellant.

In the result, the appeal stands disposed of in the above terms.

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To

1. The Principal District Judge
Cuddalore

2. The Record Keeper
V.R. Section
High Court of Madras

[SANT 8638]